Abraham Maybee, and which last judgment was subsequent to the judgment in this cause.

By the affidavits filed on behalf of the application, it appeared that the patent of the lot issued to one James Johnston; that the heir-at-law (as it was said by Mr. Ruttan, but the heirship was denied by plaintiff) of the patentee sold this lot to Mr. Ruttan, in the year 1822; that Mr. Ruttan sold the east half of the land to the son of the defendant, in 1834, that Mr. Ruttan, and those claiming under him, have been in possession since about the year 1830 or 1831; that in 1852, the plaintiff commenced an action of ejectment against the defendant for the east half, and another action of ejectment against Abraham Maybee for the west half, to whom Ruttan had conveyed in 1846; that the plaintiff obtained a verdict against McKenna, but failed against Maybee; that the same evidence which procured a verdict for Maybee could have been given in this suit against McKenna, if there had not been some understanding about it (the defence was the Statute of Limitations); that judgment was entered against McKenna on the 16th June, 1863, and a writ of possession issued, upon which the sheriff's return is endorsed—"that no one came to him to show him the tenements, or to receive the possession;" that long before the *alias* writ issued, Wm. Johnston and the defendant died; that the *alias* was delivered to the sheriff on the 21st May, 1863, and re-executed on the 1st June by the east half being delivered to the agent of the surviving plaintiff, the said half being then in the possession of Williamson, who claims title under Sylvester McKenna; that the surviving plaintiff threatens to put the writ in force against Maybee; that Geo. S. Boulton owned the east half when this action was brought, although the defendant was in possession; that Boulton, in 1837, conveyed this half to McKenna, who mortgaged the same, and afterwards gave a deed of it to James Williamson, in 1858, who mortgaged it to John Hughes; and that Hughes assigned the mortgage to Durand, who assigned to Turley.

The title seemed really to be, on the part of the defendant, as follows: Daniel Johnston, assuming to be the heir-at-law of the patentee, conveyed to Ruttan; Ruttan to Patrick McKenna, whose heir-at-law the defendant was; the defendant to Robertson; Robertson to D. E Boulton; D. E. Boulton to Geo. S. Boulton; Geo. S. Boulton to Wm. McKenna; Wm. McKenna to James Williamson, James Williamson mortgaged to Hughes; Hughes assigned to Durand; and Durand assigned to Turley, who, on the application, claimed as mortgagee.

It was alleged that the reason the plaintiff delayed executing his writ of possession was, that an action would be brought against him, and he would be turned out of possession, on the same evidence which defeated him in the suit against Maybee, and that the case was purposely postponed till the witnesses might not be forthcoming.

For the plaintiffs, Meyers stated that the suit against Maybee was not taken to trial by the plaintiff, but by the defendant; that Sylvester McKenna and his wife were the principal witnesses upon whose testimony as to the length of possession the verdict was rendered; and that this evidence was opposed to all that McKenna had always told Meyers. He also gave a full narrative of the proceedings. William Johnson swore he was the heir-at-law of the patentee; that after losing the suit against Maybee, he made up his mind not to proceed for the west half any further; that McKenna applied for a new trial, but was refused it; that he never was aware of any one being on the land till 1837, and that the evidence to the contrary was untrue.

It appeared that Turley had lately commenced proceedings in Chancery, and had perpetuated the testimony given on the trial in Maybee's suit, and was about to get a writ for possession from Chancery, when, as he said, the plaintiff had forestalled him.

Richards, Q. C., showed cause. He argued: 1. The death of one of the two plaintiffs is no irregularity, although no suggestion is *made on the roll of his death, and although his name is still used* as if he were living (Arch. Pr. 11 Edn. 596; *Qourke* v. *The Mayor of Gravesend*, 7 C. B. 777; Con. Stat. U. C. cap. 27, sec. 27). 2. That the death of a sole defendant does not, in ejectment, abate the proceedings; because the writ of possession is against the land, or to deliver possession of the land, rather than against the defendant personally (*Withers* v. *Harris*, L. Ray. 808; Con. Stat. U. C. cap. 27, sec. 39). 3. That it was not necessary to obtain the leave of the court, or of a judge, to issue the *alias* writ, although more than six years had elapsed since judgement was entered, because an original writ of execution had been issued within the year, and returned and filed (*Hall* v. *Boulton*, 3 P. C. Rep. 142). 4. That the plaintiffs, being entitled to possession, had the power to turn out any one in possession of the land, although a stranger to the original defendant; but in this case Mrs. Williamson, who was removed, was in possession under persons deriving title from the defendant. 5. That although, in the separate suits which the plaintiffs brought against the defendant and Maybee, the whole lot was claimed from each defendant, and although the plaintiffs recovered against the defendant for the whole lot, there is no repugnancy in the judgment in Maybee's action being against the plaintiff for the whole lot; that Maybee never was, in fact, in possession of the east half, and there can be no estoppel in his favor against this plaintiff in McKenna's suit, to which he is a stranger.

C. S. Patterson, in reply, argued: 1. The right of a surviving plaintiff to go on in his own name and in the name of a deceased co-plaintiff, only exists where the judgment is joint and the interest of the deceased passes to the survivor, which is not necessarily the case here; for the two plaintiffs may have been tenants in common, in which case the right of the deceased would not accrue to the survivor, but would devolve upon his heir or devisee; and that sec. 34 of the Con. Stat. U. C. cap. 27, does not apply to this case at all, because this co-plaintiff died before this section of the act was passed (*Davy* v. *Cameron*, 14 U. C. Q. B. 483; *Ib.*, 15 U.C. Q.B. 175; *Rex* v. *Cohen*, 1 Stark, N. P. 511; and Tidd's Pr. 8th ed. 1170; *Ib.*, 9th ed. 1119, 1121). 2. As to a sole defendant's death after judgment in ejectment, it does not seem to be decided that it is absolutely necessary to revive the judgment, although it is even here recommended to be proper to do it. 3. That this *alias* has been irregularly issued after the six years; because the plaintiff, never having applied to get the possession under his original writ, as appears by the sheriff's return, must be considered to have abandoned it, he cannot now, to avoid the necessity of a revivor, call in aid this effete process (*Doe d. Reynal* v. *Tucket*, 3 Bad. 773).

ADAM WILSON, J.—As to the death of one of the plaintiffs after judgment and before the issuing of the *alias* writ, it is laid down in Tidd's Pr., 9th ed. 1120, that "It is now settled, that when there are two or more plaintiffs or defendants in a personal action, and one or more of them die within a year after judgment, execution may be had for or against the survivors without a *sciere facias*, but the execution should be taken out in the joint names of all the plaintiffs or defendants, otherwise it will not be warranted by the judgment." And this statement of the law is expressly supported by *Rudt* v. *The Mayor of Gravesend* (7 C. B. 777), and in *Cooper* v. *Norton* (16 L. J. Q. B. 364). The case referred to in Tidd is *Penyer* v. *Brace* (1 Ld. Ray. 244), which was trespass against five persons, and judgment against all. The five bring error; and pending the proceedings in error, one of the five plaintiffs in error dies, upon which the plaintiff in the original suit sued out execution against all five, and it was held that if the writ in error had been certified to the court that it had abated by the death of one of the five, inasmuch as it was, until so certified, a supersedeas of the judgment below, the plaintiff below might have sued out his execution against the four living, and the fifth, who was deceased, without first suing out a *sci. fa.* The argument is stated as follows: "Where a new person shall take benefit by or become chargeable to the execution of a judgment, who was not party to the judgment, there a *sci. fa.* ought to be issued against him to make him a party to the judgment, or in the case of executors and administrators; but where the execution of a judgment is not chargeable or beneficial to a person who was not a party to the judgment, there it is otherwise as where there is a survivorship." In the same case, in 1 Salk. 319, it is added, "There is no reason why death should make the condition of survivors better than before." And Holt, C. J., says that "a *capias* or *fi. fa.* being in the personalty, might survive, and might be sued against the survivors without a *sci. fa.*; otherwise if an *elegit*, for there the heir is to be a contributory." In the same case, in 8 Mod. 338, it is said, "If two plaintiffs recover, and one die before execution, the survivor may take it out without a *sci. fa.*, because he is party and privy to the judgment; and if it should happen that the dead man had released the judgment, the defendant may bring *audita querela*, and be relieved."

In *Withers* v. *Harris*, 7 Mod. s. c., Ld. Ray. 806, judgment in ejectment, upon the terms that there should not be execution till a